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No. 94-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JON T. LIEGAKOS,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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75 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether retroactive application of a new state procedural rule to deny state appellate review of federal constitutional claims violates the Due Process Clause of the Fourteenth Amendment.

2. Whether a criminal defendant was denied his constitutional right to testify on his own behalf when he did not personally waive that right in open court and the trial court neither advised him that he had a constitutional right to testify nor determined at the time of trial that he had voluntarily and knowingly waived that right.

3. Whether the right to effective assistance of counsel under the Sixth and Fourteenth Amendments requires that counsel fully and objectively inform the

defendant of the costs and benefits both of testifying and of not testifying on his or her own behalf.

PARTIES IN COURT BELOW

Other than the present Petitioner and Respondent, there were no parties in the proceedings in the Wisconsin Supreme Court whose judgment is sought to be reviewed.

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OPINIONS BELOW

The order of the Wisconsin Supreme Court denying permissive review is unreported. That order is reprinted at

Appendix A (App. 1a) to this Petition.

The decision of the Wisconsin Court of Appeals, which affirmed the order of the circuit court was unreported. That decision is reprinted at Appendix B (App. 1b-5b) to this Petition.

The decision and order of the Wisconsin Circuit Court denying Liegakos' motion for post-conviction relief were unreported. They are reprinted at Appendix C (1c-11c) of this Petition.

JURISDICTION

The order of the Wisconsin Supreme Court denying permissive review was entered on October 24, 1994. This Court's jurisdiction is invoked under 28 U.S.C. §§1257(a) & 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition concerns the construction and application of the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides:

> No state shall ... deprive any person of life, liberty, or property, without due process of law....

U.S. Const. amend. XIV.

This petition also concerns the construction and application of the Self-incrimination and Due Process Clauses of the Fifth Amendment to the United States Constitution which provide:

> No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law....

U.S. Const. amend. V.

This petition also concerns the construction and application of the

Compulsory Process and Assistance of Counsel Clauses of the Sixth Amendment to the United States Constitution which provide:

> In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF THE CASE

By criminal complaint filed February 18, 1986, Jon T. Liegakos was charged with the first degree murder of Richard Lundgren while using a dangerous weapon in violation of Wis. Stat. §§940.01 & 939.63(1)(a)(2). That charge arose from a fight between the two men outside a Kenosha, Wisconsin tavern. Lundgren died of stab wounds received during that fight.

Under Wisconsin law at the time, the

defendant's unreasonable but sincere exercise of his privilege of self-defense mitigated what would otherwise have been first-degree murder to manslaughter. *See* Wis. Stat. §940.05(2) (1985-86). Defendant's trial counsel, Terry Rose, relied upon such imperfect self-defense at trial. He rested the defense case without Liegakos having testified, however, and without an on-the-record waiver by Liegakos of his right to testify.

After a three-day trial, the jury found Liegakos guilty as charged on April 17, 1986, and the trial judge sentenced him to life imprisonment.

On direct appeal, the Wisconsin Court of Appeals affirmed the conviction in an unpublished decision dated September 23, 1987, and the Wisconsin Supreme Court denied review.

On November 23, 1992, Liegakos filed

a motion for post-conviction relief pursuant to Wis. Stat. §974.06. That motion alleged that Liegakos had been denied his right to testify at trial when the court neither advised him of his right to testify, obtained a personal, on-the-record waiver of that right, or otherwise determined at the time of trial that trial counsel's failure to call him as a witness reflected Liegakos' knowing and voluntary waiver of that right. The motion also alleged that Liegakos was denied his right to the effective assistance of counsel due to trial counsel's failure adequately to advise him concerning his right to testify, counsel's failure adequately to investigate and to present relevant exculpatory evidence at trial, and counsel's other failures not at issue here. None of these claims had been raised on Liegakos' direct appeal.

The circuit court, Hon. Mary Wagner-Malloy, presiding, held an evidentiary hearing on January 22, 1993. Attorney Rose testified at that hearing that he first advised Liegakos, prior to trial, that he should not testify. Rose discussed the issue with him on a number of occasions, and claimed that Liegakos agreed not to testify.

Rose further claimed that he discussed "the pros and cons" of testifying with Liegakos. Yet, when specifically asked what he said to Liegakos about testifying, Rose merely restated the reasons why he believed Liegakos should not testify.

Liegakos testified that he told Rose a number of times that he wanted to testify because he was the only one who knew what he was thinking and feeling at the time of the fight. Although Rose told

him the final decision whether to testify was up to Liegakos, Rose was determined that Liegakos not testify and spent most of their meetings trying to convince Liegakos of his point of view. Liegakos finally gave in at the beginning of trial because "I had to agree with him 'cause he was my lawyer and I thought he knew best."

Rose never suggested why Liegakos might in fact want to testify. He never informed Liegakos, for instance, that the jury might hold it against him for not testifying, nor did he discuss with Liegakos the problems of proving his intent at the time of the stabbing without his testimony. Had Rose discussed these issues with him, Liegakos would have insisted on testifying.

Liegakos further testified at the post-conviction motion hearing concerning what his testimony would have been, had he

been called to testify at his trial. In summary, he would have explained to the jury that Lundgren initiated the fight, and that Liegakos initially took out the knife and showed it to Lundgren hoping to avoid a fight by scaring him off. Liegakos used the knife to stab Lundgren only after Lundgren had tackled him and was on top of him, slamming his head into the cement street and no one responded to his requests for help. Even then, Liegakos did not want to kill Lundgren; he just wanted to hurt him badly enough to make him stop. By written decision dated April 27, 1993, Judge Wagner-Malloy denied the post-conviction motion (App. 1c-10c). The court entered a written order reflecting that denial on May 20, 1993 (App. 11c).

Liegakos timely filed his notice of appeal to the Wisconsin Court of Appeals

on May 27, 1993. His opening brief to that court raised the same issues asserted in his §974.06 motion.[1]

In its response brief to that court, the state raised for the first time the question whether Liegakos' claims were procedurally barred by his failure to raise them on direct appeal. The state recognized that the Wisconsin Supreme Court previously had held that a defendant was entitled to review of constitutional claims under §974.06 even if he could have raised those claims on direct appeal. *See Bergenthal v. State*, 72 Wis. 2d 740, 242 N.W.2d 199, 202-03 (1976). However, the

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[1] The only §974.06 claims not raised on appeal concerned trial counsel's failure to preserve an objection to prosecutorial misstatements to the jury and to offer certain prior statements of the defendant at trial. The right to testify and the remaining ineffectiveness claims were presented to the Court of Appeals.

state asked that *Bergenthal* be overruled and moved to bypass the Court of Appeals so this case could be consolidated with a pending Wisconsin Supreme Court case which would address that very issue. Liegakos joined the state's petition to bypass, but the Wisconsin Supreme Court denied that petition on November 16, 1993. Briefing in the Court of Appeals was completed on November 24, 1993.

On June 22, 1994, the Wisconsin Supreme Court overruled *Bergenthal* in *State v. Escalona-Naranjo*, 185 Wis.2d 169, 517 N.W.2d 157 (1994). The court there held for the first time that, absent "sufficient reason," a defendant may not raise a constitutional challenge under §974.06 which could have been raised on direct appeal. 517 N.W.2d at 164.

After the decision in *Escalona-*

Naranjo, Liegakos sought leave to file supplemental briefs addressing the effect of that decision by motion dated July 6, 1994. A copy of that motion is attached as Appendix D (App. 1d-7d). That motion objected to retroactive application to him of *Escalona-Naranjo*'s overruling of *Bergenthal* as, among other reasons, a violation of due process (App. 4d).

Although the state did not oppose the motion, the court of appeals denied it on July 25, 1994, stating that "supplemental briefs are not necessary.' A copy of that order is attached as Appendix E. (App. 1e-2e). On August 24, 1994, that court summarily affirmed, relying upon the decision in *Escalona-Naranjo* (App. 1b-5b).

Liegakos timely petitioned the Wisconsin Supreme Court for review on September 23, 1994. That petition challenged the retroactive application of

Escalona-Naranjo as, *inter alia*, a violation of the Due Process Clause of the Fourteenth Amendment. The petition also raised the same right to testify and ineffective assistance claims presented to the court of appeals. The Wisconsin Supreme Court denied that petition without comment on October 24, 1994 (App. 1a).

REASONS FOR ALLOWANCE OF THE WRIT

I.

RETROACTIVE DENIAL OF THE RIGHT TO REVIEW OF FEDERAL CONSTITUTIONAL CLAIMS

Section 974.06 of the Wisconsin Statutes provides a procedure for post-conviction relief similar to that provided by 28 U.S.C. §2255. Under §974.06, a person in custody may, after the time for direct appeal expires, move the court

which imposed sentence to vacate or set aside that sentence on the grounds, *inter alia*, that it "was imposed in violation of the U.S. constitution or the constitution or laws of [Wisconsin], [or] that the court was without jurisdiction to impose such sentence...." Wis. Stat. §974.06(1).[2]

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[2] Wis. Stat. §974.06(1) provides in full as follows:

> **(1)** After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under a sentence of a court or a person convicted and placed with a volunteers in probation program under s. 973.11 claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of the state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Almost nineteen years ago, in *Bergenthal v. State*, 72 Wis.2d 740, 242 N.W.2d 199, 202-03 (1976), the Wisconsin Supreme Court held that criminal defendants were entitled to judicial consideration of constitutional challenges to their convictions and incarceration under Wis. Stat. §974.06 "[e]ven though the issue might properly have been raised" on the defendant's direct appeal. For eighteen years, the lower courts in Wisconsin consistently followed that holding. *E.g.*, *State v. James*, 169 Wis.2d 490, 485 N.W.2d 436 (Ct. App.), *rev. denied*, 491 N.W.2d 766 (1992); *State v. Coogan*, 154 Wis.2d 387, 453 N.W.2d 186, 192 (Ct. App.), *rev. denied*, 454 N.W.2d 806 (1990)N.W.2d ; *State v. Klimas*, 94 Wis.2d 288, 288 N.W.2d 157, 162-63 (Ct. App. 1979), *rev. denied*, 95 Wis.2d 745, 292 N.W.2d 874, *cert. denied*, 449 U.S.

1016 (1980).

Liegakos thus was entitled to review of all of his §974.06 claims under the law in effect throughout the time of his conviction and sentence, his direct appeal, his §974.06 motion, and, indeed, up until the decision in *State v. Escalona-Naranjo*, 185 Wis.2d 169, 517 N.W.2d 157 (1994), decided 7 months after briefing was completed in the court of appeals.

Only in *Escalona-Naranjo* did the Wisconsin Supreme Court overrule *Bergenthal* and reinterpret the "successive petitions" provision of §974.06 in such a manner as to require an assertion of "sufficient reason" for not raising one's constitutional claims on a prior direct

appeal.[3] The lower Wisconsin courts following *Bergenthal* and the plain language of the statute had construed §974.06(4) as imposing such a requirement only where the defendant had omitted the claim from a prior motion under §974.06. *E.g. James, supra.* Liegakos had filed no

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[3] The provision reinterpreted in *Escalona-Naranjo*, Wis. Stat. §974.06(4), provides as follows:

> **(4)** All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intentionally waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

such prior §974.06 motion.

Defendants do not, of course, have a due process right to appeal or post-conviction relief. Having once assured defendants such as Liegakos that they would suffer no loss of their constitutional claims due to a failure to raise an available issue on direct appeal, however, due process should have barred the Wisconsin courts from imposing such a loss once those defendants acted on that assurance. *Cf. United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 670-75 (1973); *Cox v. Louisiana*, 379 U.S. 559, 568-73 (1965) (conviction for picketing near courthouse violated due process where police did not object to location and in effect told defendants they could meet where they did); *Raley v. Ohio*, 360 U.S. 423, 437-40 (1959) (convictions for refusing to answer

certain questions violated due process where defendants told their refusals were privileged; irrelevant that defendants may have refused anyway); *see* U.S. Const. amend. XIV.

Although not specifically basing its holding on due process grounds, this Court essentially held as much in *Ford v. Georgia*, 498 U.S. 411 (1991) (retroactive application of new contemporaneous objection rule not adequate and independent state ground barring federal review of federal constitutional claim).[4] As the Court there held:

> [T]he sufficiency of [a state procedural] rule to limit all review of a constitutional claim itself depends upon the timely exercise of the local power to set procedure. "Novelty in procedural requirements cannot be permitted to thwart review in

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[4] *But see Easter v. Endell*, 37 F.3d 1343, 1345-47 (8th Cir. 1994) (construing *Ford* as based in due process).

> this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."

498 U.S. at 423, quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958). *See also James v. Kentucky*, 466 U.S. 341, 348-51 (1984) (only "firmly established and regularly followed state practice" may be interposed by a state to prevent subsequent Supreme Court review of a federal constitutional claim).

Because the Wisconsin Court of Appeals' refusal to consider Liegakos' federal constitutional claims rested upon the retroactive application of a radically new state procedural rule, that decision violates due process and directly conflicts with the spirit, if not the holdings, of all applicable decisions of this Court. Review by this Court thus is appropriate. *See* Sup. Ct. R. 10.1(c).

II.

WAIVER OF THE RIGHT TO TESTIFY

This case raises important issues regarding the nature of the waiver of the constitutional right to testify on one's own behalf and the related duties of court and counsel. These issues have seriously divided the lower courts and accordingly present the paradigmatic case for resolution by this Court. *See* Sup. Ct. R. 10.1(b) & (c).[5]

Liegakos did not personally waive his right to testify on the record at the time of trial. Neither his trial counsel nor the trial court fully advised Liegakos

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[5] The Wisconsin courts' retroactive application of the new procedural rule announced in *Escalona-Naranjo* does not, of course, bar this Court's review of Liegakos' right to testify claims. *Ford, supra.*

concerning his right to testify and the trial court made no effort to ensure that his silence was a knowing and voluntary waiver of that right. In fact, it was not.

It is now well-established that an accused's right to testify is a personal and fundamental constitutional right. *See Rock v. Arkansas*, 483 U.S. 44, 52 (1987). That right is derived from the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law, from the compulsory process clause of the Sixth Amendment, which grants a defendant the right to call witnesses in his favor, and as a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. *Id.* at 51-53.

The question remains, however, concerning exactly how this right may be waived. This Court has stated in *dicta*

that trial counsel may not waive the accused's right to testify. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (defendant makes ultimate decision whether to testify). It likewise has held that similarly personal and fundamental rights may not be waived without an on-the-record determination by the trial court, at the time of the purported waiver, that the waiver is knowing and voluntary. *See, e.g., Taylor v. Illinois*, 484 U.S. 400, 417-18 & n.24 (1988) ("basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client" include the right to plead not guilty and have a trial, the right to a jury trial, and the right to be present during trial); *Faretta v. California*, 422 U.S. 806, 835 (1975) (right to counsel); *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969) (right to trial);

Johnson v. Zerbst, 304 U.S. 458 (1938) (right to counsel); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277-78 (1942) (right to jury trial). The Court also has held that waiver of such rights may not be presumed from a silent record. *E.g., Boykin*, 395 U.S. at 242; *Johnson*, 304 U.S. at 464.

Although these requirements for waiver would appear to apply at least as strongly to the right to testify at trial, *see Rock*, 483 U.S. at 52 ("[A]n accused's right to present his own version of events in his own words" is "[e]ven more fundamental to a personal defense that the right of self-representation"), the Court has not yet addressed such issues in the specific context of that right.

A number of lower courts have addressed such issues as whether the defendant must be fully informed by

counsel or by the court of the right and relevant considerations prior to deciding whether to waive it, whether the defendant must personally waive that right on the record at the trial, and whether the trial court must determine the validity of the waiver at the time of trial. The result is a hopeless morass of differing standards and analyses which only this Court can clarify and resolve. *See generally*, Annot., *Necessity That Waiver of Accused's Right to Testify in Own Behalf Be on the Record*, 90 A.L.R.4th 586 (1991 & 1994 Supp.), and cases cited therein.

A. Granting Certiorari in this Case Will Resolve the Widespread Conflict Among the Lower Courts Concerning Whether the Fundamental and Personal Right to Testify Must Be Waived Explicitly and on the Record at Trial

A brief review of some of the lower court decisions which have addressed this

issue shows a tangled web of different approaches. A number of decisions have held that, given the personal and fundamental nature of the right, an on-the-record determination by the trial court that waiver of the right to testify is knowing and voluntary is required at the time of trial. *See, e.g., People v. Curtis*, 681 P.2d 504 (Colo. 1984); *Culberson v. State*, 412 So.2d 1184 (Miss. 1982); *State v. Ray*, 427 S.E.2d 171, 174 (S.C. 1993); *State v. Neuman*, 371 S.E.2d 77 (W. Va. 1988); *cf., United States v. Teague*, 953 F.2d 1525, 1541-47 (11th Cir.) *(en banc)* (Clark, J., concurring and dissenting), *cert. denied*, 113 S.Ct. 127 (1992); *United States v. Martinez*, 883 F.2d 750, 761-74 (9th Cir. 1989) (Reinhardt, J., dissenting), *vacated*, 928 F.2d 1470 (9th Cir.), *cert. denied*, 501 U.S. 1249 (1991); *State v. Simpson*, 185

Wis. 2d 772, 519 N.W.2d 662, 667-68 (Ct. Ap. 1994) (Schudson, J., concurring in part, dissenting in part). *See also* Note, *Waiver of the Criminal Defendant's Right to Testify: Constitutional Implications*, 60 Fordham L. Rev. 175 (1991). Such a procedure is consistent with the requirements for waiver of other personal and fundamental rights noted previously.

Other courts, however, follow the so-called "demand rule," finding that the right to testify is waived unless it is specifically asserted by the accused. *E.g.*, *United States v. McMeans*, 927 F.2d 162 (4th Cir. 1991); *United States v. Martinez*, 883 F.2d 750 (9th Cir. 1989); *United States v. Bernloehr*, 833 F.2d 749, 751-52 (8th Cir. 1987); *State v. Joyner*, 625 A.2d 791, 807-08 (Conn. 1993); *People v. Simmons*, 364 N.W.2d 783 (Mich. 1985); *Wilcox v. Leapley*, 488 N.W.2d 654, 659

(S.D. 1992).

These courts view the nature of the right to testify as essentially "a trial decision with constitutional implications," *United States v. Joelson*, 7 F.3d 174, 178 (9th Cir.), *cert. denied*, 114 S.Ct. 620 (1993), and seem to require that the accused interrupt the lawyers and judge to assert his or her right, *see e.g.*, *id.* ("[I]f the defendant wants to testify, he can reject his attorney's tactical decision by insisting on testifying, speaking to the court, or discharging his lawyer" (citation omitted)). In essence, these courts conclusively presume waiver from a silent record.

Still other courts recognize, however, that an accused understandably might feel too intimidated to risk contempt charges by speaking out of turn.

E.g., Underwood v. Clark, 939 F.2d 473, 476 (7th Cir. 1991). While not requiring an on-the-record colloquy and determination by the trial judge, these courts likewise reject the "demand rule's" finding of waiver from a silent record. *See id.* Rather, these courts permit a post-trial challenge to the conviction on the grounds that the defendant did not in fact knowingly and voluntarily waive the right to testify. *See, e.g., Jordan v. Hargett*, 34 F.3d 310, 314 (5th Cir. 1994); *Underwood*, 939 F.2d at 476; *Boyd v. United States*, 586 A.2d 670, 677-78 (D.C. App. 1991). *See also United States v. Vargas*, 920 F.2d 167 (2d Cir. 1990), *cert. denied sub nom., Duluc del Rosario v. United States*, 112 S.Ct. 93 (1991); *State v. El-Tabech*, 453 N.W.2d 91, 95 (Neb. 1990); *Sanchez v. State*, 841 P.2d 85, 88-89 (Wyo. 1992). Even these courts, however, differ

as to what evidence must be presented to support such a claim. *Compare Underwood*, 939 F.2d at 475-76 (affidavit of defendant that attorney denied his request to testify alone insufficient to require hearing), *with Boyd*, 586 A.2d at 671-72, 677-78 (defendant's statements after guilty verdict and at sentencing that she wanted to testify but lawyer would not let her mandated hearing on waiver issue).

Even those courts which do not require an on-the-record colloquy or waiver strongly disagree over the propriety of such a practice.

A number of courts, while not requiring such an on-the-record colloquy and determination at trial, recommend that one be made. *E.g.*, *LaVigne v. State*, 788 P.2d 52, 55 (Alaska App. 1990), *rev'd on other grounds*, 812 P.2d 217 (1991); *Boyd v. United States*, 586 A.2d 670, 674 (D.C.

App. 1991) (court leaves open decision whether trial court *must* conduct colloquy on the record, but strongly recommends such a procedure); *Torres-Arboledo v. State*, 524 So.2d 403, 411 n.2 (Fla. 1988), *cert. denied*, 488 U.S. 901 (1988); *State v. Hoffman*, 778 P.2d 811, 814 (Idaho App. 1989); *Commonwealth v. Siciliano*, 471 N.E.2d 1359, 1362 (Mass. App. 1984); *Phillips v. State*, 782 P.2d 381, 382 (Nev. 1989); *State v. Wilson*, 179 Wis.2d 660, 508 N.W.2d 44, 48 n.3 (Ct. App. 1992), *rev. denied*, 513 N.W.2d 406 (1994), *cert. denied*, 115 S.Ct. 100 (1994); *Sanchez*, 841 P.2d at 89.

Other courts, however, have gone beyond holding simply that such a practice is unnecessary and have stated that it may actually interfere with the defendant's right to testify, *see, e.g., State v. Savage*, 577 A.2d 455, 473 (N.J. 1990), or

defense counsel's trial strategy, *see, e.g., Simmons*, 364 N.W.2d at 785; *Wilcox*, 488 N.W.2d at 659.

A final approach to this dilemma is that taken by the Eleventh Circuit in *United States v. Teague*, 953 F.2d 1525 (11th Cir.), *cert. denied*, 113 S.Ct. 127 (1992). The court there held that, because it is primarily the responsibility of defense counsel to advise the defendant concerning the right to testify and thereby to ensure that the right is protected, claims that one's right to testify was violated should be analyzed under the standards for ineffective assistance of counsel. *Id.* at 1534-35. *See also, Taylor v. State*, 843 P.2d 682 (Kan. 1992) (no duty of trial court to address silent defendant re waiver, but defendant may raise ineffectiveness of counsel); *Savage*, 577 A.2d at 473 (same).

Given the plethora of conflicting lower court decisions and analyses concerning the waiver of one's right to testify, review by this Court is amply justified. *See* Sup. Ct. R. 10.1(b) & (c). There is no apparent reason to conclude that the lower courts will soon agree on a general analysis for addressing waiver of the right to testify. Each of the conflicting lines of cases rests upon what its proponents view as persuasive reasoning. The differences between these conflicting modes of analysis thus will not soon, if ever, be overcome absent resolution by this Court.

B. This Court Should Grant The Writ To Define The Duties Of Defense Counsel In Advising The Accused About The Decision To Testify

Related to defining the duty of the trial court in advising the accused of the

right to testify and assuring a knowing and voluntary waiver is the question of the role of defense counsel in advising the accused of those rights. Specifically, is it enough that the client makes the ultimate decision without being coerced, or must the lawyer ensure that the decision is a fully informed one? This question as well has produced serious conflict among the lower courts.

Trial counsel here testified at the post-conviction motion hearing that he informed Liegakos of several reasons why he should not testify, that he informed Liegakos that Liegakos had the final say concerning whether he testified, and that Liegakos ultimately acquiesced in counsel's decision that he not testify. However, counsel did not discuss the dangers of Liegakos' not testifying, and therefore did not provide him with

sufficient information to make a knowing and voluntary decision.

If defense counsel is primarily responsible for advising the accused of the right to testify or to decline to testify, then a defendant's right to testify may be violated when the duty is breached by defense counsel. *See Teague*, 953 F.2d at 1534; *Nichols v. Butler*, 953 F.2d 1550, 1552 (11th Cir. 1992).

In *Teague*, the court observed that defense counsel bears the primary responsibility for advising the defendant not only of his right to testify or not to testify and that it is ultimately for the defendant himself to decide, but also must advise the defendant of "the strategic implications of each choice." 953 F.2d at 1533. The court explained that:

> [t]his advice is crucial because there can be no effective waiver of a fundamental constitutional

> right unless there is an "intentional relinquishment or abandonment of a *known* right or privilege."

953 F.2d 1533 (footnote omitted), quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (emphasis added by *Teague* court). That court went on to explain that counsel's failure to ensure that the defendant's right to testify is protected and that any waiver of that right is knowing and voluntary would constitute deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Teague*, 953 F.2d at 1534. *Accord*, *Savage*, 577 A.2d at 473 ("counsel's responsibility includes advising a defendant of the benefits inherent in exercising [the right to testify] and the consequences inherent in waiving it").

Other courts, however, have suggested that counsel's obligation is fulfilled

when the defendant knows that he or she could testify but acquiesces in counsel's decision. *E.g.*, *Gill v. State*, 632 So.2d 660, 661 (Fla. App. 1994); *Aragon v. State*, 760 P.2d 1174, 1178-79 (Idaho 1988).

At least one court has even gone so far as to suggest that the only basis for an ineffective assistance of counsel claim would be if defense counsel was shown to have coerced the accused into making the decision not to testify or otherwise prevented the defendant from testifying. *See Lema v. United States*, 987 F.2d 48, 52-53 (1st Cir. 1993).

Once again, there is no reason to believe that the lower courts will soon resolve this conflict on their own. Without resolution by this Court, therefore, ultimate protection of an accused's right to testify will turn on

the happenstance of what jurisdiction happens to have filed the charge.

CONCLUSION

For the reasons stated the petition for a writ of certiorari to the Supreme Court of Wisconsin should be granted.

Dated at Milwaukee, Wisconsin, January __, 1995.

Respectfully submitted,

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APPENDIX A

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 93-1523

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JON T. LIEGAKOS,

Defendant-Appellant-Petitioner.

October 24, 1994

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of defendant-appellant-petitioner, Jon T. Liegakos, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

APPENDIX B

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 93-1523

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JON T. LIEGAKOS,

Defendant-Appellant.

August 24, 1994

Before Anderson, P.J., Nettesheim and Snyder, JJ.

Jon Liegakos appeals from a trial court order denying his § 974.06, Stats., motion. Based on our review, at conference, of the briefs and record, we

conclude that this case is appropriate for summary disposition. *See* RULE 809.21, Stats. We affirm the order of the circuit court.

We do not reach the merits of Liegakos' challenge to the order denying his § 974.06, Stats., motion because we conclude that § 974.06(4) as construed in the recent supreme court decision in *State v. Escalona-Naranjo*, ___ Wis.2d ___, 517 N.W.2d 157 (1994), precludes Liegakos from litigating issues he should have raised in his direct appeal. *Escalona-Naranjo* makes clear that "the defendant should raise the constitutional issues of which he or she is aware as part of the original postconviction proceedings." Id. at ___, 517 N.W.2d at 164. It further explains that "the plain language of subsection (4) [of S 974.06] ... requires a *sufficient*

reason to raise a constitutional issue in a sec. 974.06 motion that could have been *raised* on direct appeal. *Escalona-Naranjo*, ___ Wis.2d at ___, 517 N.W.2d at 164.

Liegakos' conviction was affirmed in a RULE 809.30, Stats., appeal in 1987. However, Liegakos did not claim on appeal that trial counsel rendered ineffective assistance or that he was deprived of the opportunity to testify. Liegakos has not shown a sufficient reason for his failure to raise those claims in his direct appeal.[1]

Liegakos contends that it was the State's burden to argue in the circuit court that § 974.06(4), Stats., barred him

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[1] In an order dated July 25, 1994, we denied Liegakos' request to file supplemental briefs addressing *State v. Escalona-Naranjo*, ___Wis.2d ___, 517 N.W.2d 157 (1994).

from pursuing claims he should have raised on direct appeal. We cannot agree that the statute places such a burden upon the State. The statute states that "[a]ny ground ... not so raised ... in the proceeding that resulted in the ... sentence may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted ... in the original, supplemental or amended motion." *Id.* The statute does not require the State to raise this; rather, the clear inference is that the movant must provide a sufficient reason before any new ground may be addressed. Liegakos did not provide such a reason to the circuit court, and he does not provide such a reason on appeal. Therefore, we conclude that Liegakos did not satisfy the dictates of § 974.06, as explained by *Escalona-*

Naranjo.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to RULE 809.21, Stats.

APPENDIX C

STATE OF WISCONSIN
CIRCUIT COURT WALWORTH COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

Post-Conviction Motion

JON T. LIEGAKOS,

Case No. 86-CF-70
Judge Mary Wagner-Malloy

Defendant.

The above captioned matter came on for a post-conviction motion hearing on January 22, 1993. Bruce Becker, Assistant District Attorney, appeared on behalf of the State of Wisconsin. The defendant appeared in person and was represented by Robert Henak and James Shellow, his attorneys.

Jon Liegakos was convicted of 1st Degree homicide after a jury trial which concluded on April 17, 1986. His convic-

tion was appealed and on September 23, 1987 the Court of Appeals affirmed in an unpublished decision. The Supreme Court denied a petition for review. This motion for post-conviction relief pursuant to Wis. Stat. 974.06 was filed November 23, 1992 in this Court. The defendant raises two basic claims. First, that Mr. Liegakos was denied the right to testify depriving him of his constitutional right to present a defense. Second, that the defendant was denied effective assistance of counsel.

The motion came on to be heard January 22, 1993. Briefs have been submitted. After consideration of all the testimony, briefs, and record the Court issues the following decision.

VIOLATION OF RIGHT TO TESTIFY

At the hearing of the motion Mr. Liegakos testified that the decision to

testify at trial was left to him. He discussed it five or six times on three different occasions with his attorney. Mr. Rose advised him to not take the stand but made it clear to him it was his decision. He understood clearly that he was in charge of whether he chose to take the stand.

Mr. Rose's testimony agreed with that of Mr. Liegakos's. He explained to the defendant the advantages and disadvantages of testifying. He reviewed Mr. Liegakos' desire to testify one last time when the state rested. Mr. Liegakos decided knowingly and voluntarily not to testify. Mr. Liegakos was not denied his constitutional right to present his defense by testifying in his own behalf and this record clearly meets with the standard set in State v. Albright, 96 W.2122 [sic], 291 NW 2d 487 (1980).

DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL

Strickland v. Washington, 466 US 668 (1984) sets out the test for determining effective assistance of counsel as follows:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. Id. at 687. To meet

the first step of the test the defendant offers the following in their motion:

a. Mr. Liegakos' trial counsel failed to advise him concerning his right to testify in a manner sufficient for Mr. Liegakos knowingly and voluntarily to have waived that right.

b. The prosecutor at trial relied heavily on the testimony of Sonya Rogganbuck, the bar manager, to demonstrate to the jury that Mr. Liegakos did not in fact believe that be had to stab Lundgren in self-defense. According to her testimony, Mr. Liegakos called her at the bar after the stabbing and said something to the effect that "This kid was hassling me, so I had to stab him. He gave me a big shiner so I had to stab twice more."

i) failure of Attorney Rose to cross-examine Rogganbuck,
ii) failure by Rose to investigate via Liegakos and Schuchow,

iii) failure to question Tom Liegakos and Schuchow in trial about Rogganbuck's statement

c. At least twice during its rebuttal argument, the state misstated the law related to imperfect self-defense manslaughter. Defendant's trial counsel promptly objected each time and subsequently filed a post-conviction motion seeking a new trial on that ground, but failed to move for a mistrial as is required to preserve the issue for appeal. As a result, the Court of Appeals deemed the issue to have been waived in direct appeal.

d. In a recorded statement following his arrest, Mr. Liegakos told police officer Bronk that he originally intended to use the knife only as a deterrent or like brass knuckles, that he did not want to stab anyone, and that he showed the knife to Mr. Lundgren before the fight to warn him off. It was only after Lundgren began bashing Mr. Liegakos' head into the concrete that Mr.

> Liegakos" gorged [sic] him like in the stomach" in order to make him stop. Mr. Liegakos made a similar statement to Sergeant Callahan. Trial counsel, however, failed to offer these statements as evidence at trial.

This Court has previously discussed the issue of Mr. Liegakos' right to testify. This Court is convinced that the defendant made that decision freely, voluntarily and knowingly. Upon further examination the position that Mr. Rose took with his client, that it would not be to the defendant's benefit to testify, was absolutely reasonable in view of the facts of this case. Mr. Liegakos' demeanor, appearance as a witness, prior inconsistent statement to police officers and to his attorney were all factors that could lead Mr. Rose to knowledgeably hold the opinion he had about his client taking the stand.

Attorney Rose testified as to his reasons for not cross examining Rogganbuck. Mr. Liegakos, defendant, confirmed the accuracy of her report. The circumstances of the testimony emphasized the truthfulness of her testimony and to question her about her relationship with the deceased could have permitted much sympathy evoking information to be presented to the jury.

Mr. Rose's reasoned decision to not cross examine Mrs. Rogganbuck was a reasonable tactical decision.

Mr. Rose did not move for mistrial during the closing argument when on at least two occasions the prosecution misstated the law. Mr. Rose did object and state the reason for objection. Judge Breitenbach did instruct the jury on the law properly. Because Mr. Rose did not move for mistrial the Appellate Court

would not review.

The obligation of defense counsel is to obtain for his client a fair trial, not to preserve every issue appealable even when it has caused no unfairness or prejudice. Mr. Rose's decision not to move for mistrial was knowledgeable based on the law and reasonable tactically. The prosecution's error was corrected after Rose's objection as it should have been in the interest of justice.

The rules of evidence do not permit admission of Mr. Liegakos' statement to the police officers when offered by the defense. In this trial such statements would be inadmissable [sic] hearsay. This argument by the defendant is totally without merit.

As to each and every issue raised by defendant's counsel there is no showing that the first prong of the Strickland

test is met. The Court is not convinced first, of any error, moreover "error so serious counsel was not functioning as the 'counsel'" guaranteed the defendant by the Sixth Amendment. Furthermore, there was no showing by the second test that the defendant was denied a fair trial based on the claimed errors.

For all of these reasons the motion for post-conviction relief pursuant to the Wis. Stat. 974.06 is denied.

Dated this 27 day of April, 1993.

BY THE COURT:
/s/
Mary Wagner-Malloy
Circuit Court Judge
Branch 6

STATE OF WISCONSIN
CIRCUIT COURT WALWORTH COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs. Case No. 86-CF-70

JON T. LIEGAKOS,

Defendant.

ORDER

For the reasons stated in this Court's decision dated April 27, 1993, the defendant's motion for post-conviction relief pursuant to Wis. Stat. §974.06 is DENIED.

Dated at Kenosha, Wisconsin this 20 day of May, 1993.

By the Court:

/s/
Hon. Mary Wagner-Malloy
Circuit Court Judge

APPENDIX D

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 93-1523

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JON T. LIEGAKOS,

Defendant-Appellant.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFS

Jon T. Liegakos, by undersigned counsel, respectfully moves this Court pursuant to Wis. Stat. (Rule) 809.14 for the entry of an Order permitting the parties to submit supplemental briefs to address the effect of *State v. Escalona-Naranjo*, Case No. 92-0846 (Wis. June 22, 1994), and *State v. Braun*, Case No. 91-0923 (Wis.

June 22, 1994), on this case.

As grounds for this motion, Mr. Liegakos states as follows:

1. This case is before the Court on appeal from the circuit court's denial of Mr. Liegakos' motion for post-conviction relief, filed pursuant to Wis. Stat. §974.06. Briefing in this Court was completed on November 29, 1993.

2. As currently briefed, the case presents issues concerning whether Mr. Liegakos was denied his constitutional rights to testify on his own behalf and to effective assistance of counsel. In addition, the state raised, for the first time on this appeal, the issue whether Wis. Stat. §974.06(4) barred Mr. Liegakos from raising these issues. While recognizing that its argument was barred by binding authority in *Bergenthal v. State*, 72 Wis.

2d 740, 242 N.W.2d 199, 203 (1976), the state raised the issue in anticipation of a bypass petition to the Supreme Court.

3. Mr. Liegakos joined the state's subsequent bypass petition. However, the Supreme Court denied that petition by order dated November 16, 1993.

4. On June 22, 1994, the Wisconsin Supreme Court overruled *Bergenthal* in *State v. Escalona-Naranjo*, Case No. 92-0846 (Wis. June 22, 1994). In the course of that decision, and in the companion case of *State v. Braun*, Case No. 91-0923 (Wis. June 22, 1994), the Court also discussed the purpose of Wis. Stat. §974.06 and the meaning of the "sufficient reason" language in Wis. Stat. §974.06(4).

5. Mr. Liegakos believes that supplemental briefs discussing the effect of *Escalona-Naranjo* and *Braun* would assist in

refining the issues to be decided in this case and to ensure that he has a full and fair opportunity to address the radical change in the law accomplished in those decisions. Mr. Liegakos anticipates that his supplemental brief would address (1) whether *Escalona-Naranjo*'s reconstruction of §974.06(4) should be applied retroactively to him in light of his reasonable reliance upon 18 years of binding Supreme Court precedent to the effect that he was entitled to bring these claims under §974.06 even if he could have raised those claims on direct appeal, (2) the due process violation inherent in retroactive application of that decision under these circumstances, and (3) the existence of "sufficient reason" under Wis. Stat. §974.06(4) for not raising these constitutional issues on direct appeal.

6. Undersigned counsel represents Kathleen Braun, the defendant in *State v. Braun, supra*. He will file a motion for reconsideration with the Wisconsin Supreme Court in that case on or before July 12, 1994. Undersigned counsel also is informed by Attorney John Birdsall, counsel for the defendant in *State v. Escalona-Naranjo, supra*, that he intends to file a motion for reconsideration in that case on or before July 12, 1994.

7. Mr. Liegakos respectfully submits that supplemental briefing would be most worthwhile if it was delayed so that it could take into account the Supreme Court's resolution of those motions for reconsideration.

8. Undersigned counsel spoke by telephone today with counsel for the state, AAG Maureen McGlynn-Flanagan concerning this motion. AAG Flanagan in-

formed him that she has no objection to the request for leave to file supplemental briefs or for a delay in filing such briefs pending resolution of the motions for reconsideration in the Supreme Court. However, she asks that the Court not order simultaneous briefs.

WHEREFORE, for these reasons, Mr. Liegakos respectfully moves this Court for an Order (1) staying resolution of this appeal pending supplemental briefing by the parties concerning the effects of *State v. Escalona-Naranjo, supra* and *State v. Braun, supra*; and (2) setting a supplemental briefing schedule, with opening, response, and reply briefs, to commence after entry of orders by the Wisconsin Supreme Court resolving the motions for reconsideration in those cases. Alternatively, Mr. Liegakos asks that the Court enter an Order permitting the par-

ties to submit supplemental briefs on a schedule deemed appropriate by the Court.

Dated at Milwaukee, Wisconsin, January 13, 1995.

Respectfully submitted,

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APPENDIX E

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 93-1523

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JON T. LIEGAKOS,

Defendant-Appellant.

July 25, 1994

Before Anderson, P.J.

The appellant requests permission for the parties to file supplemental briefs in this appeal to address the effect of *State v. Escalona-Naranjo*, No. 92-0846 (Wis. June 22, 1994) and *State v. Braun*, No. 91-0923 (Wis. June 22, 1994). We conclude that supplemental briefs are not necessary. Therefore,

IT IS ORDERED that the motion for leave to file supplemental briefs is denied.